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No. 01-1384

IN THE

Supreme Court of the United States

MICHIGAN PEAT, A DIVISION OF BAY-HOUSTON TOWING COMPANY, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE REGIONAL ADMINISTRATOR OF REGION V OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

The Environmental Protection Agency failed to adhere to the statute and its own regulations governing the Clean Water Act permitting process. The agency did not follow those controlling rules when it directed the State of Michigan to return authority over Michigan Peat's Clean Water Act permit application to the Army Corps of Engineers. The Sixth Circuit's decision, which countenanced the EPA's

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[1] Petitioner's Rule 29.6 Statement appears at Pet. ii.

unauthorized power play, is flatly contrary to controlling Supreme Court precedent and the decisions of its sister circuits. The court's decision threatens the careful balance struck by numerous federal-state cooperative regulatory regimes, and it should be reversed.

1. Respondents spend the first several pages of their opposition setting forth the Clean Water Act's detailed statutory and administrative permitting scheme. Opp. 2-5. And as respondents duly observe, that detailed program provides for the EPA to reenter a state's federally approved permitting process only at certain times and in certain circumstances. *See Friends of Crystal River* v. *EPA*, 35 F.3d 1073, 1075 (6th Cir. 1994) (noting that EPA retains only "[l]imited * * * oversight authority" over Michigan's Section 404 program). The regulations direct that if within 90 days of receiving EPA's objections to a proposed permit, the State Director "*neither* satisfies EPA's objections * * * *nor* denies the permit," *then* the Secretary of the Army, on behalf of the Corps of Engineers, "shall process the permit application." 40 C.F.R. § 233.50(j) (emphases added). Those are the only two triggering events that allow the Corps of Engineers to seize control of an individual permit application.

Respondents recognize as much. *See* Opp. 3-4. They also acknowledge that Michigan DEQ had satisfied the EPA's objections to the proposed permit in 1995; that EPA had subsequently *withdrawn* its objections; and that DEQ had issued a permit conforming with EPA's specifications. *See id.* at 5-6; Pet. App. 16a. With that, EPA's role in the permit process was complete—as the Sixth Circuit recognized in its earlier decision on Michigan Peat's first appeal. *See* Pet. App. 30a. The agency's subsequent action—two years later—divesting the State of authority over Michigan Peat's permit process was entirely outside the scope of its regulations. *See United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (government agencies must obey controlling procedural rules); Pet. 14-22 (citing cases).

Respondents contend, however, that EPA's action in this case was lawful because the 1995 permit was never "final," since Michigan Peat appealed the permit's conditions. Opp. 8, 14-15. That is wrong for two reasons. First, the pertinent question is not at what point the permit was "final"; it is whether the regulations grant EPA any further role in the permit process once the agency approves a permit's conditions. The regulations plainly do not.

Second, as the Sixth Circuit correctly recognized in its decision on Michigan Peat's first appeal, "if Michigan Peat [had] sign[ed] the permit it would have waived" the appellate remedies expressly granted by the State's federally approved Clean Water Act permit program. Pet. App. 30a. Michigan Peat's decision to pursue the administrative remedies to which it was entitled did not give the EPA license to force Michigan Peat to start the permit process all over again with the Corps of Engineers. The EPA's argument would put permittees in an intolerable situation; they could either accept onerous permit conditions and forgo their right to an administrative appeal, or they could pursue an appeal that EPA could abort at any time, forcing permittees to start from square one with the federal government. Nothing in the regulations countenances that Catch-22.

Respondents also argue that Michigan's "state-only" permit—which the State issued in collaboration with the EPA,[2] without any permit application pending, and while Michigan Peat was pursuing its administrative appeal—constituted a "second permit decision" triggering agency review. Opp. 12-13. That simply begs the question presented in this petition: whether it is proper, after a final permit satisfying EPA's objections has issued and is on administrative appeal, for EPA to cut that process short by soliciting from the State,

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[2] Respondents take issue with Michigan Peat's characterization of EPA's close collaboration with the State. Opp. 14. The agency actively participated in developing the "state-only" permit stratagem, as the record makes clear. *See* Pet. 9-10.

and then objecting to, a phony "state-only" second permit that expressly disclaims any effect under the Clean Water Act.

3. Respondents also argue that Michigan Peat failed to present below the argument it makes now. Opp. 14. That is not so. In its Sixth Circuit brief, Michigan Peat repeatedly argued that the EPA's return of authority over Michigan Peat's Section 404 permit to the Corps of Engineers was unlawful because it occurred outside Michigan's Section 404 permit and administrative appeal process. Michigan Peat expressly argued to the court of appeals that the EPA's action had unlawfully "undone the 1995 final § 404 permit decision" and had "rendered the administrative review process a nullity." *See Michigan Peat* v. *United States EPA*, No. 01-1154 (6th Cir.), Appellant's Br. 21. Michigan Peat likewise argued that the agency's action denied it the process to which it was entitled under the Section 404 permit program. *See id.* at 29, 30-31. And Michigan Peat pointed out (*id.* at 30) that the District Court's decision approving the transfer of authority to the Corps of Engineers conflicted with the decision of the Third Circuit in *Public Interest Research Group of New Jersey, Inc.* v. *Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 78 (3d Cir. 1990)—a conflict that, as Michigan Peat observed in its petition, has now ripened into a square conflict between the courts of appeal. *See* Pet. 22-23.

In its rehearing petition, Michigan Peat reiterated that "transfer of permit jurisdiction occurs by operation of law, not by choice of the executive agencies," and that the EPA's action vesting the Corps of Engineers with authority over Michigan Peat's permit application was an unlawful end-run around Michigan's "due process mechanism for permit contests" under the State's federally approved Section 404 program. Pet. Reh. 9, 11. The issue presented here was quite plainly, and more than once, pressed before the Sixth Circuit below.

Respondents also suggest that because the Sixth Circuit affirmed the District Court without fully airing the issues in a published opinion, this Court should not grant the petition. *See* Opp. 12. But this Court routinely grants certiorari in cases where the circuit court has provided no analysis to justify its decision beyond the reasoning employed by the district court. *See, e.g., Eastern Associated Coal Corp.* v. *United Mine Workers*, 531 U.S. 57, 61 (2000) (issuing merits decision after Fourth Circuit had summarily affirmed the district court); *Carter* v. *United States*, 530 U.S. 255, 260 (2000) (issuing merits decision after Third Circuit had affirmed the district court in a summary unpublished opinion); *see also Sims* v. *Apfel*, 530 U.S. 103, 105-106 (2000) (reversing summary Fifth Circuit decision).

4. Finally, respondents barely muster a response to our argument that the effect of the Sixth Circuit's aberrant ruling will be widespread. Respondents argue that this case "presents no issue of widespread or recurring importance" because only two states currently operate federally approved Clean Water Act permitting programs. Opp. 16. But this Court itself has recognized that there are "*numerous* federal statutory schemes" that foster cooperation between federal and state entities and that allow states to operate regulatory programs with limited federal oversight. *See New York* v. *United States*, 505 U.S. 144, 167-168 (1992) (citing statutes and cases) (emphasis added). Those programs work—and they are becoming increasingly popular—exactly *because* the federal government's role is circumscribed; once a State's program is found to pass muster, the State has primary authority over its program, with only carefully delineated exceptions. The EPA's action here undercut that crucial balance, and the Sixth Circuit's decision condoning EPA's action paves the way for other federal agencies cooperating in state-administered permitting programs to freely disregard their controlling rules as well.

* * * *

For the foregoing reasons, as well as those set forth in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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